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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536

File:

Office: NEBRASKA SERVICE CENTER

Date:

MAY 08 2003

IN RE: Petitioner:

Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a Middle Eastern bakery. It seeks to employ the beneficiary permanently in the United States as a specialty baker. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is January 5, 1998. The beneficiary's salary as stated on the labor certification is \$14 per hour or \$29,120 per year.

The director noted that the petitioner reported only \$2,010 of taxable income, \$3,000 of depreciation, and \$6,300 of net current

assets, less than the proffered wage, on the 1998 Form 1120, U.S. Corporation Income Tax Return, for its employer identification number (EIN) 36-4223764. On January 12, 2001, the director determined that the record clearly showed that the petitioner did not have the income to pay the proffered wage at the priority date and denied the petition.

The petitioner appealed and supplemented the evidence on May 21, 2001 (May 2001 supplement). Counsel specified no error, but merely inferred that depreciation is part of the funds available to pay the proffered wage at the priority date. The AAO discussed the corporate and financial evidence of the 2001 supplement. On January 11, 2002, the AAO dismissed the appeal, since the petitioner had not established that it had sufficient available funds to pay the proffered wage at the priority date and continuing to the present.

On February 14, 2002, counsel filed this motion with two items of new evidence. They were the 1998 Form 1040, U.S. Individual Income Tax Return, of [REDACTED] and [REDACTED] and the sales and use tax return of a predecessor bakery with different owners (Montrose).

The 2001 supplement included the Articles of Incorporation and a stock certificate of [REDACTED] [sic], presumably the petitioner. Federal tax returns related wholly to other entities, viz., Forms 1120S of EIN 36-4024030 for 1998, EIN 36-3839188 for 1998 and 1999, ID [REDACTED] (1998 and 1999 Forms 1040), and, on this motion, ID [REDACTED] (1998 Form 1040 of [REDACTED] and [REDACTED]). These federal tax returns, including the new one of [REDACTED] and [REDACTED] relate to other entities than the petitioning corporation. Similarly, a deed conveyed a piece of real property in joint tenancy, but named only [REDACTED] not the petitioner. Evidently, counsel believes that common interests with other entities and taxpayers support the petitioning corporation's ability to pay the proffered wage at the priority date.

Contrary to counsel's primary assertion, the Bureau, (formerly the Service), may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Next, counsel, wrongly, infers that depreciation is available to pay the proffered wage at the priority date. In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Initial submissions included the petitioner's commercial bank statements to show that it had sufficient cash flow to pay the proffered wage. There is no evidence, however, that they somehow show additional funds beyond those of the tax returns and financial statement. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel concedes that [REDACTED] sales and use tax return pertains to a different business, which was, subsequently, renamed. The record, including the petitioner's Articles of Incorporation, has no evidence that [REDACTED] qualifies as a successor in interest to [REDACTED]. This status requires documentary evidence that [REDACTED] has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor in interest. In addition, in order to maintain the original priority date, a successor in interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The brief expands the claim of net income, but offers no accounting of it:

10. That while [REDACTED] had been operating from January 1, 1998 through April 30, 1998, when [REDACTED] was assumed by Mr. [REDACTED] who then changed the name of the bakery to [REDACTED], that the business clearly was earning a net sum providing adequate income for the subject employee. Further, that this sum was prevalent throughout the balance of 1998 while the bakery continued to show profit of some 30 per cent (30%) over gross earnings. The evidence attached clearly establishes the same.

[REDACTED] sales and use tax returns are incomprehensible as an income statement and balance sheet. They do not claim to report "monthly earnings." They contain no element of an audited financial statement or annual report to satisfy regulations to establish the ability to pay the proffered wage. See 8 C.F.R. § 204.5(g)(2). Counsel's brief on this motion, in 9., mistakes the petitioner's taxable income before net operating loss deduction and special deductions on the 1998 federal tax return as \$6,210, less than the proffered wage. All sources agree that it was \$2,010, less than the proffered wage.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

In 1998, the petitioner shows \$2,010 of taxable income before net operating loss deduction and special deductions, plus \$6,300 of net current assets for a total of \$8,310, less than the proffered wage. No evidence supports either the position of the petitioner as the successor in interest of [REDACTED] or the ability of Montrose to pay the proffered wage in 1998.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of

eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

After a review of the federal tax returns, assets, sales tax returns, and proof of corporate structure, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.

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